NO. 80-1181

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

WILLIAM A. McCALL, SR., THE DREDGE CORPORATION, a Nevada corporation, and THE ESTATE OF OLAF H. NELSON,

Petitioners,

vs.

CECIL D. ANDRUS, Secretary of the Interior of the United States of America, et al.,

Respondents.

SMALL TRACT APPLICANTS ASSOCIATION,

Intervenor.

INTERVENOR'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN CASE NO. CA 77-3429

JOEL M. COOPER
Attorney for Intervenor
SMALL TRACT APPLICANTS
ASSOCIATION
302 E. Carson, Suite 601
Las Vegas, Nevada 89101
Tele. (702) 382-4343

TABLE OF CONTENTS

		Page No.
I	STATEMENT OF THE CASE	1
II	REASONS FOR DENYING PETITIONERS' PETITION	8
III	CONCLUSION	17

TABLE OF AUTHORITIES CITED

Page No.

C A S E S

Barrows v. Hickel 13
447 F2d 80 (9th Cir. 1971)

Castle v. Womble 14
19 ID, 455, 457 (1894)

Cole v. Ralph 16
252 U.S. 286, 307 (1919)

Foster v. Seaton 14
271 F2d 836 (D.C. Cir. 1959)

Palmer v. Dredge Corporation 14
398 F2d 791 (9th Cir. 1968)

United States v. Alice A. and
Carrie H. Boyle 16
76 ID 318 (1969)

United States v. Coleman 13
390 U.S. 599, 602 (1968)

United States v. Gibbs 14
13 IBLA 382, 384 (Nov. 21, 1971)

STATUTES AND OTHER AUTHORITIES

30 U.S.C. 611 13
30 U.S.C. 22 13
43 U.S.C. 682 1

Supreme Court Rule 17 8

STATEMENT OF THE CASE

This case involves twenty-one (21) placer mining claims located March 20, 1948, by predecessors in interest of Petitioners (R.79). The claims are five (5) miles from the center of the City of Las Vegas, Nevada (A.32).

The lands in all the contested claims except Las Vegas No. 23 were classified for disposal under the Small Tract Act (43 U.S.C. 682) by Classification Order No. 95 dated October 2, 1953. The lands embraced in Las Vegas No. 23 claim were classified for disposal under the Small Tract Act by Order No. 130 dated September 20, 1957 (A.32 & 33).

The present proceedings began in 1960 when the Bureau of Land Management filed Complaints alleging that no discovery had been made on the claims because the material could not be marketed at a profit and no actual market for the material had been shown (R.81). As to Las Vegas No. 23, a Contest Complaint was filed June 21, 1961, on the same basis as

those of the other claims (R.81). A four-day hearing was held April 20-23, 1965, on the Complaints at Las Vegas, Clark County, Nevada, before Hearing Examiner John R. Rampton, Jr. The evidence presented in the administrative hearings is as follows:

George O. Scarfe, Jr., a Valuation Engineer with the Bureau of Land Management in Sacramento, California, testified that he examined the claims June 8, 1959, July, 1963, and January, 1965 (Tr.140). The claims are located on an alluvial fan consisting of limestone fragments of sizes from boulders down to fine sands and silts (Tr.144). About six (6) types of materials were found on the claims: (1) blow-sand, (2) wind born sand covering most of the surface to a depth of about a foot, (3) loose gravel, (4) caliche capping found over practically all the claims at depths varying from 0 feet from the surface down to 3-1/2 to 4 feet, (5) cemented gravels and lake deposits, and (6) in major washes some rework gravel which

was loose (Tr.144).

Specifically as to caliche, Mr. Scarfe testified that it is a calcareous cement which presents problems in working sand and gravel claims. It complicates mining because it cements the gravels in place. At spots in these claims, the caliche actually forms a cap. Caliche looks like concrete and it can be broken only by blasting. Caliche coating on gravel often makes the gravel less desirable and requires more treatment to make it an acceptable quality to market (Tr.147-148).

Mr. Scarfe further testified that a hard caliche capping is found everywhere on the claim at varying depths; on some claims it was within a foot of the surface. On Claim No. 8, it was right at the surface. It looks like concrete. It varies from one to three feet in thickness (Tr.180).

As to the development of the claims, Mr. Scarfe testified that there was no mining whatever on the claims up to 1959, only trenching

and bulldozing work (Tr.180). There was no evidence of any removal of any materials from the claims in 1959 (Tr.183).

In order to make aggregate from the claims, Mr. Scarfe testified that it would be necessary to drill and blast the caliche capping and cemented gravels. Of course, this work would add to the cost of production. In fact it was much more costly than mining loose gravels (Tr.187).

On Claims 3, 4, 5 and 6, Mr. Scarfe in 1963 noticed considerable lake bed deposits mixed with the gravels which would be deleterious to production (Tr.189). The cemented material underlying nearly all the claims would have to be drilled and blasted before it could be mined and this increases the cost (Tr.196-7).

The sand and gravel material on these claims is similar to that on other claims in the general area (Tr.203-4). Mr. Scarfe also testified that he sampled all the claims for placer gold. The results proved negative showing no gold (Tr.209-10).

Finally, the fact that there was no production on the claim in conjunction with the competition for sand and gravel in the Las Vegas Valley greatly influenced Mr. Scarfe's decision that there was no valid claim (Tr.224).

Louis G. Chichester, Bureau of Land Management Assistant Land Office Manager, Reno, Nevada, Land Office, testified that he examined the claims in July, 1963, October 21, 1964, and January, 1965. His answers would be substantially the same as those given by Scarfe. He checked Claim No. 23 without Scarfe (Tr.235). Mr. Chichester testified that Claim No. 23's surface is composed of highly cemented gravels except in washes (Tr.237). There is no exploration work there nor mining improvements (Tr. 239). It would not be practical to mine No. 23 in Mr. Chichester's mind (Tr.239).

Mr. Chichester checked for gold on Claim 23 and found none (Tr.244).

Mr. Chichester concluded that the claims could not have been mined profitably prior to

July 23, 1965 (Tr.261).

On behalf of Petitioners, Vernon O. Bradley testified that he could not say exactly what he mined from these claims, although he is the one who located them in 1948 (Tr.280).

Mr. Bradley knew of no holes of any considerable extent on the claims until 1957 (Tr.307). There was no substantial amount of materials taken from the claims from 1948 to 1957 (Tr.305).

Also on behalf of the Petitioners, Stanley Hanson, General Manager for Wells Stewart Construction Company testified that the claims were located for reserves (Tr.276).

Joe W. Wells, President of Wells Cargo, testified on behalf of Petitioners that in four or five years prior to the hearing, they obtained a piece of equipment known as the "Ripper." Before that it was necessary to blast to get cemented gravels (Tr.352). This testimony was substantiated by William C. Hartman, a Vice-President of Wells Cargo. He said

that before they obtained the Ripper it was necessary to blast and drill (Tr.391).

The Hearing Examiner, Mr. Rampton, rendered his decision August 15, 1968, finding that Petitioner's placer mining claims were invalid and that any market, if one did exist for the material found on the claims, came only after June 23, 1955 (A.52).

Petitioners appealed the decision of the Hearing Examiner and on March 22, 1971, the decision of the Hearing Examiner was affirmed by the Interior Board of Land Appeals (A.53).

Subsequently, Petitioners sought judicial review before the United States District Court for the District of Nevada. The District Court proceeding was handled by way of Stipulation and Order dated August 29, 1975, which provided that the parties would file cross-motions for Summary Judgment (See A.23). The United States District Court decided against Petitioners and an appeal was taken to the United States Court of Appeals for the Ninth Circuit. In a deci-

sion filed July 10, 1980, the Circuit Court of Appeals affirmed the decision of the District Court.

REASONS FOR DENYING PETITIONERS' PETITION

Analyzing each of Petitioners' arguments as to why a Writ of Certiorari should be granted, it is clear that Petitioners must fail in their Petition.

First, it is important to emphasize that Supreme Court Rule 17 provides that a review on Writ of Certiorari is not a matter of right, but of judicial discretion which will be granted only when there are "special and important reasons therefor." Rule 17 lists the type of matters which will be entertained on a Writ of Certiorari -- for example, when a Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter, or has decided a federal question in a way which is in conflict with the State Court of last resort, or has so

far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Petitioners contend that their petition should be granted since a clash is brewing between the "mushrooming federal bureaucracy and a tax-paying electorate that resents its high cost." Petitioners point out that President Reagan supports a movement in the Western States which expresses resentment against bureaucratic control of Western Lands, said movement being known as the "Sagebrush Rebellion."

It would appear that granting Petitioners' Petition will not reduce the taxpayers' high cost. It will, in fact, increase taxpayers' costs by requiring further Court involvement. Likewise, it is difficult to see the connection between the "Sagebrush Rebellion" and the granting of Petitioners' Petition. It would appear that the "Sagebrush Rebellion" is a political matter which should not be of concern to the Supreme Court, any way. This

conclusion is supported by the burdensome caseload which the Supreme Court must already bear.

Petitioners' next argument is that the decision below will "affect adversely the mining of all minerals including strategic mining in short supply" so that "our national economy and defense will be in jeopardy." This argument is totally without support. It is clear that this case involves the unique area of common varieties of sand and gravel; and, Petitioners' fears seem to be totally without justification.

Third, Petitioners argue that a conflict of opinion exists between the Ninth Circuit and the Tenth Circuits as to whether cases such as the instant case can be disposed by way of Summary Judgment. Since, in the instant case, Petitioners themselves stipulated before the District Court for the District of Nevada, that the case should be resolved by way of Summary Judgment, there would appear to be no reason for the Court to exercise its discretion to

grant Petitioners' Petition. The Stipulation and Order providing for cross motions for Summary Judgment were dated August 29, 1975 (See A.23).

Petitioners' fourth argument, to-wit: that there was no substantial evidence upon which to base the lower Court's decision simply is not supported by the record. As seen in the Statement of the Case in this Opposition Brief, there was a great deal of evidence supporting the lower decisions, and Petitioners' present Petition does not appear a valid method to obtain another re-hashing of the evidence. The Supreme Court is not intended to be a trier of fact, and in fact, it is not suited for such purposes. After having lost before the Hearing Examiner, John R. Rampton, Jr., the Board of Land Appeals, the United States District Court for the District of Nevada, and the Ninth Circuit Court of Appeals, it appears a little far-fetched anyway to say now that there was not substantial evidence to support the lower

decisions.

Petitioners' argument that the Court below departed from the usual and accepted standard for considering the evidence in the record as a whole is likewise groundless. If in fact Petitioners wanted additional fact-finding, they should not have stipulated to have the matter heard on cross-motion for Summary Judgment. However, since Petitioners did so stipulate, it is hard to see how they can now claim they are entitled to the granting of their Petition.

Again, Petitioners' argument that the Ninth Circuit Court applied the wrong legal principle in reaching its decision simply does not provide a basis for granting a Writ of Certiorari. First, it is clear from reading the record that the Ninth Circuit Court applied the correct legal principles, as did the United States District Court for the District of Nevada. In order for a mineral claim on public lands to be valid, it is necessary that the

discovered mineral deposits be 'valuable' (30 U.S.C. 22 (1964). By act of July 23, 1955, 69 Stat. 368, 30 U.S.C. 611, Congress determined that 'common varieties' of sand and gravel cound not thereafter qualify as 'valuable mineral deposits' within the meaning of the mining laws of the United States.

Consequently, if (Plaintiffs) did not discover valuable sand and gravel deposits on the claim sites prior to July 23, 1955, they do not have a valid claim". Barrows v. Hickel, 447 F2d 80, 82 (9th Cir. 1971).

In determining whether Petitioners had fully complied with the statutory requirements of the "discovery" of sand and gravel deposits prior to July 23, 1955, the Secretary utitlized the Prudent Man test. This test is characterized in United States v. Coleman, 390 U.S. 599, 602 (1968), as follows:

> "... in order to qualify as 'valuable mineral deposits,' the discov-

> ered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine ...
>
> Castle v. Womble, 19 ID, 455, 457 (1894).

This test has been refined by the requirement that " ... it must be shown that the mineral can be extracted, removed and marketed at a profit." United States v. Gibbs, 13 IBLA 382, 600 (1971). This requirement is the marketability test.

The marketability test has been specifically applied to sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation, 398 F2d 791 (9th Cir. 1968), cert den., 393 U.S. 1066 (1969); Foster v. Seaton, 271 F2d 836 (D.C. Cir. 1959).

The possibility of such marketing is insufficient to satisfy the marketability test for sand and gravel claims in the Las Vegas area. In Foster v. Season, supra, at p. 838,

the Court noted:

> "The Government's expert witness testified that the Las Vegas Valley is almost entirely sand and gravel of similar grade and quality. To allow such land to be removed from public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development."

None of the decisions below in this case were based solely on the fact that Petitioners failed to show a demand for sand and gravel on each of their specific claims. Rather, the decisions were based on the Prudent Man - Marketability Test and after careful review of all the evidence produced during the four-day administrative hearing held before John R. Rampton, Jr.

Specifically, the Board of Land Appeals held as follows:

> "Obviously, the claimants have failed to show that by reason of present demand, bona fides in development, proximity to market and accessibility, and other factors, the deposits on these Las Vegas claims were of

such value that they could have been mined, removed and disposed of at a profit as of July 23, 1955." (A.72)

Further, the Board held:

"The contestees assert that they have satisfied all the requirements of the statute. Under consistent rulings of the Department and of the courts, a valid discovery of a valuable mineral deposit is essential to establish the validity of a mining claim, even in view of section 2332, Revised Statutes, 30 U.S.C. Sec. 38, Cole v. Ralph, 252 U.S. 286, 307 (1919); United States v. Alice A. and Carrie H. Boyle, 76 I.D. 318 (1969). Under circumstances as in these proceedings where the evidence falls far short of that required to establish a valid discovery as of July 23, 1955, the claims were properly declared null and void." (A.73)

Neither does a reading of the Board of Land Appeals decision support Petitioners' contention that the decision of the Board of Land Appeals was a policy decision exceeding statutory and discretionary powers resulting in legislative enactment by executive tribunals which lack such authority. Likewise,

Petitioners are incorrect when they say that the decision of the Board of Land Appeals was based solely on the basis of the "too much" rule. The question of reserves was one of the factors considered, but it was certainly not the sole consideration (A.31).

CONCLUSION

For the foregoing reasons, Petitioners' Petition for a Writ of Certiorari should be denied. It has been over twenty (20) years since the original Hearing Examiner's decision herein, and it appears that it is proper at this time to finally bring this matter to a conclusion.

DATED: February 13, 1981.

Respectfully submitted,

JOEL M. COOPER

JOEL M. COOPER
Attorney for Intervenor
SMALL TRACT APPLICANTS
ASSOCIATION
302 E. Carson, Suite 601
Las Vegas, Nevada 89101
Tele. (702) 382-4343

STATE OF NEVADA)
) SS.
COUNTY OF CLARK)

AFFIDAVIT OF MAILING

LYNNETTE B. JENSEN, being first duly sworn on oath, deposes and says: That Affiant is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 17 day of February, 1981, Affiant deposited in the United States Post Office at Las Vegas, Nevada, three (3) copies of the within INTERVENOR'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN CASE NO. CA 77-3429, enclosed in sealed envelopes upon which first class postage was fully prepaid, addressed to the following, being all the parties required to be served:

Mr. William Braly Murray, Attorney for Petitioners, 505 Title & Trust Building, 321 S.W. Fourth Avenue, Portland, Oregon, 97204;

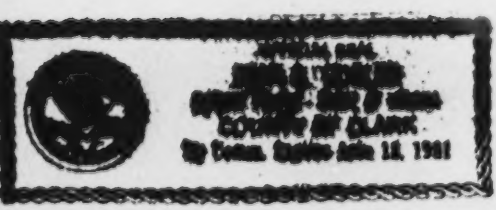
Solicitor General, Department of Justice, Washington, D.C., 20530;

United States Attorney General, Room 5119, Department of Justice, Tenth & Constitution NW, Washington, D.C., 20530.

Lynnette B. Jensen
LYNNETTE B. JENSEN

SUBSCRIBED & SWORN to before me this 17 day of February, 1981.

NOTARY PUBLIC, Clark County, Nevada.



see 80

1180